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Thank you for that kind introduction.

I would like to thank the Ethics Officer Association for inviting me to speak to you today on Corporate Crime and the Department of Justice's policies with respect to the prosecution of corporate criminals.

I would also like, before I begin, to express my admiration for the work each of you do in your respective corporations. In my 32 years as a lawyer, I have been a prosecutor, a law school professor and dean, and a large law firm litigator engaged in major commercial litigation and white collar criminal defense work. I know from experience that it is difficult to enforce ethical compliance rules in a large corporation, particularly when your recommendations and decisions may well affect the bottom line of your employer. It is, however, a critical job that you do. You are the first line in ensuring that our corporations obey the law and fulfill their duties as good corporate citizens. Your work is in the long term self interest of your employer and it is in the short and long term interest of society as well. Nevertheless, I also understand that it is a sometimes thankless task not always

appreciated by others within your organizations. Squaring the corners and complying with the requirements of the law often has costs, but is the right thing to do and can save the corporation very substantial pain, suffering and costs in the long term.

We should start with some fundamentals. *First,* corporations commit crimes. *Second*, crime should be punished. *Third*, it better to prevent a crime then to punish one. The Principles address each of these fundamentals.

Corporate crime, in all its forms - from regulatory violations, to bribery, to fraud - affects each of us. Abuse and fraud in the health care industry alone results in the loss of an estimated $100 *billion* each year. Violations of environmental, work safety, and securities regulations endanger all of us as citizens, workers, and investors. Bribery and price fixing corrupt our businesses and our government, destabilize developing democracies, and slant the playing field against honest businesses seeking to compete fairly on the basis of price and quality. We all have a stake in this issue, and all of us have an interest in curbing corporate crime.

The Department of Justice has undertaken an aggressive approach to enforcement in this area, and, under the leadership of the Attorney General, has initiated a number of important measures aimed at fighting corporate crime. The dedicated efforts of the Department and other law enforcement agencies have resulted in successful prosecution of fraudulent telemarketers, hospitals and doctors who engage in fraudulent medical billing practices, and corporations who engage in bribery of foreign officials to obtain foreign contracts and concessions. The Department has also worked with the private sector to increase awareness of fraudulent practices and to highlight "red flags" that should alert a business to approach a business opportunity with special care.

We have also worked with the private sector to encourage the development of meaningful compliance programs and to explain the Department's enforcement policies. Last year, the Department promulgated the Principles of Federal Prosecution of Corporations. These Principles serve two purposes. First, they provide guidance to line prosecutors in the U.S. Attorney's Offices and Main Justice as to the factors that should guide their decision whether to bring charges

against a corporation. Second, they represent a clear and public articulation of these factors that will provide a common ground for discussion between the private bar and the Department's attorneys.

Twenty years ago, the Department first promulgated the Principles of Federal Prosecution - a set of factors intended to guide prosecutors in exercising prosecutorial discretion. These principles, and their subsequent revisions, required prosecutors, in deciding whether or not to bring charges, to weigh such factors as the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction, and the adequacy of non-criminal approaches.

Several years ago, the Attorney General and my predecessor as Assistant Attorney General for the Criminal Division met with members of the corporate defense bar. One of the issues that was discussed was a perceived lack of uniformity in the decisions being made whether or not to charge corporations. In response, the Department, led by the Criminal Division, formed a working group to articulate the principles applicable to the corporate charging decision.

Now, before I go into the details of the Principles, I should offer a few caveats:

- -First, the Principles provide only a framework for making a decision; they do not require that charges be brought or declined in any particular case.
- -Second, the Principles come into play only after a prosecutor has determined that a corporation has committed - through its officers, employees, or agents - a crime. They do not, therefore, provide any sort of defense - they are purely a means of guiding our prosecutors in the exercise of their prosecutorial discretion.
- -Third, this discretion remains where it has always been - with the line prosecutors and their supervisors. The Principles do not provide a new avenue for appealing the decision of these prosecutors to Main Justice.
- -Fourth, not every factor is relevant to each charging decision. These Principles are designed to be flexible and one or more factors may be given little or no weight in a specific prosecution.

Why then are they even necessary? To return to the fundamentals: corporations commit crimes, crimes should be punished, it is better to prevent a crime than to punish one.

Corporations by their very nature, can only commit crimes through individuals - the corporation's officers, directors, employees, agents, and consultants. The rules of criminal liability are clear and unambiguous - a corporation may be held liable for the criminal acts of its agents when they act within the scope of their employment and at least in part, however minimally, for the benefit of the corporation. This rule holds true *even when the act is in violation of the corporation's policies*.

In most cases, it is appropriate to charge both a corporation and its wrongdoing agent, whether it be an officer, director, employee, or outside agent. At times, however, the equities may favor leniency for the corporation, particularly where the offending agent appears truly to have been a "rogue employee."

Now, the details . . .

The Principles begin with the proposition that "corporations should not be treated leniently because of their artificial nature, nor should they be subject to harsher treatment." The Department views corporate prosecutions as an important tool in combating white collar crime. We believe strongly that the deterrent effect of a criminal prosecution on one or more corporations is an effective tool against corporate crime. Whether or not to break the law cannot be a routine business decision - corporations must know that stiff penalties and negative publicity will haunt them for years.

In my view, the deterrent effect of a criminal prosecution can be very persuasive in three areas:

- -first, where conduct is pervasive in an industry, even a single corporate prosecution may encourage the other companies to take prompt remedial action;
- -second, where conduct is pervasive in a particular corporation, the

prosecution of that corporation, together with its culpable officers and directors, may help change the corporate culture; and
- -third, where the crime creates a substantial risk of great public harm, any prosecution that causes others to think twice has an obvious benefit.

The Principles set forth eight factors that focus on the specific nature of corporations. I'm not going to discuss each of them here, but amongst these factors are:

- -the pervasiveness of wrongdoing within the corporation;
- -the involvement of senior management,
- -the corporation's history, if any, of prior violations;
- -the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation; and
- -the existence and adequacy of a corporate compliance program.

Many of these factors are self-explanatory. The participation of senior management is a clear indication that the wrongdoing was not the result of an employee going off on a "frolic" but instead represented corporate policy. Similarly, past violations by the corporation and a failure to institute procedures to prevent new violations demonstrate a lack of corporate will to abide by the law.

Several issues are addressed in the Principles that deserve additional comment.

First, we expect corporations that are asking for leniency to demonstrate that they are good corporate citizens. We therefore expect corporations to report wrongdoing by their officers, directors, employees, and agents and to accept responsibility for their actions. Where an employee has truly gone on a "frolic," we expect the corporation to assist us in obtaining the evidence necessary to prosecute him. This is not to say that a corporation can buy immunity by sacrificing an employee - what it does mean is that a test of a corporation's commitment to compliance is its willingness to cooperate in the government's investigation.

One issue that comes up over and over again in the self-reporting context is the waiver of the attorney-client privilege. Often, investigations of employee

wrongdoing, particularly where the employee is in management, are carried out by counsel. In such circumstances, the interviews and the report itself may be covered by the attorney-client and work product privileges.

When a company comes into a U.S. Attorney's office or the Criminal Division to disclose wrongdoing, there is a natural tension between the company's wish to be forthcoming but not to waive its privileges and the prosecutor's wish to know all the facts and our need to evaluate the credibility and completeness of the disclosure. It should not come as a surprise to you that prosecutors may well view a company's version of the key events relevant to possible criminal liability with some skepticism. Prosecutors will ask themselves whether the corporation is putting a "spin" on the facts to minimize or even hide other culpable conduct or to protect certain employees while sacrificing others. Indeed that is exactly what happened in one case that comes to mind in which the company, after a search warrant was executed, met with prosecutors and disclosed widespread falsification of petroleum test results but failed to disclose, even though the company executives in the room were well aware of it, its participation in a foreign bribery scheme.

Given these concerns, we often want to test the underlying evidence and will demand that the company provide us with the interview notes that support its report. I should make it absolutely clear - there is no Department policy *requiring* a waiver in all circumstances. Such a waiver may be, however, in appropriate cases, fairly considered in determining whether a company is being fully forthright in its disclosure.

Another issue that has arisen over and over again in corporate prosecutions is the relevance of compliance programs. Companies will come to us and say, "We have this wonderful compliance program. What employee X did was entirely contrary to our policy. You can't punish us for the actions of a rogue employee."

Now you know that the law provides that a company is liable for the acts of its employees and agents that are within the scope of their employment and, at least in some part, for the benefit of the employer. Under this standard, it simply does not matter whether the company forbade the conduct. Whether or not to prosecute is, therefore, not a *legal* decision but one involving prosecutorial discretion.

The Principles make it clear that the existence of a compliance program does *not* justify, in and of itself, not charging a corporation. This was a matter that received a lot of attention in the Department's working group and, although different components disagreed upon the relevance of a compliance program to the charging decision, there was no disagreement on this point. To repeat, a compliance program does not, in and of itself, justify not charging a corporation.

The Principles do, however, recognize that the existence of an*adequate* and *effective* compliance program may be one of several relevant factors in determining whether to charge a corporation. What does this mean? What is an adequate and effective program?

- -An adequate and effective compliance program is one that is properly designed to detect and deter misconduct given the unique circumstances of the company - its size, its organizational structure, its lines of business, the locations in which it does business, and the location, education, and training of its employees.
- -An adequate and effective program must be communicated to all employees and its message reinforced on a regular basis. In other words, it cannot be drafted by counsel and placed on a shelf in the corporate headquarters library.
- -An adequate and effective compliance program must be *real*. Employees must be taught that compliance is as integral part of their duties and that non-compliance carries consequences. If the program is in place and problems are being detected, reported, and investigated, but no wrongdoing employee is ever disciplined, there is no reason to believe that any employee will be deterred from wrongdoing. To be real, the program must have teeth.
- -Finally, and this is without doubt the most important point, an adequate and effective compliance program must be supported, without reservation, by management. Management must make the compliance program the centerpiece of the corporation's good business program. Whenever messages are sent by senior management to the field the danger of mixed messages exist. When employees are urged to get the sale or the business "at any cost" or "with no excuses," the danger exists that some employees may conclude

that illegalities or ethical barriers are not excluded from the bottom line directive. The most senior of the company's managers must make it clear that the company is willing to discipline even senior managers who subvert the program or personally violate its requirements. If senior management demonstrate their lack of respect for the program and their lack of concern for honest business practices, there is no reason to expect that subordinate employees will act any differently.

Prosecutors may, therefore, delve into the reality of a compliance program and consider its adequacy together with other factors in making the charging decision. If a prosecutor finds, for example, that this corporation had an effective compliance program, had committed and honest management, disciplined wrongdoing employees, had no history of like violations, etc., then they may deem the employee in this matter a "rogue employee" and determine that it is not appropriate to charge the corporation.

There have been several instances that I can mention in which a corporate compliance program has been a significant factor in a corporation avoiding prosecution. For instance, a few years ago *Chiquita Brand International* disclosed to the government that a recently acquired subsidiary, John Morrell & Co. had been illegally dumping slaughterhouse waste into the Big Sioux River and falsifying its paperwork. In recognition of its disclosure and cooperation, *Chiquita Brand* was not prosecuted although the subsidiary and several of its officials were subsequently charged and convicted of Clean Water Act felonies.

Similarly, the U.S. Attorney for the Northern District of New York declined to prosecute the *Niagara Mohawk Power Co.* for environmental crimes in view of its "thorough and brutally honest internal investigation of its own actions, which report was submitted to [the U.S. Attorney] without any pre-condition or claim of privilege," its refusal to defend wrongdoing employees, and its decision to terminate or otherwise discipline such employees. Significantly, the U.S. Attorney stated that disclosure and discipline alone might not have been sufficient to avoid prosecution had not the company committed "to ensure that similar problems, if they occur, are more rapidly responded to by high-level personnel."

Finally, a third example involves Pennsylvania Blue Shield which disclosed various misconduct involving Medicare bills. The U.S. Attorney for the Middle District of Pennsylvania chose to seek a civil settlement in lieu of criminal charges, citing the company's cooperation and its "commitment to corporate integrity" which included its original disclosure to the government.

However, even if the prosecutor decides to charge the corporation and the corporation is convicted of a crime, the existence of the compliance program is still important as it may result in significant benefits at sentencing. Indeed, according to the Sentencing Commission staff, an effective compliance program can, in some circumstances, reduce the criminal fine up to *95%*. Thus, a compliance program has value - value to you and your companies - both at the charging and sentencing phases. I cannot emphasize too much the importance of an effective compliance program in ensuring that a corporation is a good citizen.

One aspect of compliance programs that I would like to close with is a sensitivity to red flags. In particular, I would like to highlight for you one red flag that I think is becoming increasingly important - patterns of payment that indicate that a corporation is being used to facilitate a **Black Market Peso Exchange**.

The Black Market Peso Exchange is the primary money laundering system used by Colombian narcotics traffickers in repatriating perhaps as much as $5 billion annually to Colombia. Under this scheme, U.S. currency from drug sales is sold, at a discount, to a Colombian peso broker's agent in the United States in exchange for the deposit of an agreed-upon amount of Colombian pesos into a Colombian drug cartel's bank account in Colombia.

The broker and his agent then assume the task of evading currency reporting requirements when placing the drug proceeds into the U.S. financial system. This can be accomplished through a variety of surreptitious transactions, such as depositing the currency into numerous, seemingly unrelated bank accounts, or purchasing large quantities of money orders or cashier's checks. Once the cash has been deposited into domestic bank accounts or converted into monetary instruments, the funds can be used to purchase consumer goods, such as electronic equipment, for shipment to Colombia or elsewhere.

Corporate compliance officers should alert corporate employees that payments coming from strange sources, or unusually large bulk cash payments, are cause for concern and may be funds involved in the money laundering process. Of course, cash payments in excess of $10,000 generally must be reported to the IRS on an IRS Form 8300. But non-cash payments may also show indicia of money laundering. For example, if a corporation received dozens of wire transfers from disparate sources as payment for a purchase by a customer and the sources of the payments appeared to have little or no relationship to the customer, this would be a suspicious circumstance that could put the corporation on notice that money laundering activity is occurring. Corporations should take measures to guard against unusual or suspicious methods of payment, since evidence of willful blindness of the illegal nature of transactions can lead to both civil and criminal liability for money laundering on behalf of the corporation and corporate employees.

Let me offer four specific points regarding money laundering and compliance programs that can be used to address the Black Market Peso Exchange problem as well as other crime problems:

1. Companies, especially those that have international business, and whose commodities are used by professional money launderers in Black Market Peso Exchange schemes, should have a specific anti-money laundering component in their compliance programs. Such companies should designate a Compliance Officer who is specifically tasked to look at money laundering issues with a particular emphasis as to how the company might be used to unwittingly launder money and to ensure that employee receive regular training concerning money laundering patterns.

2. It is important to institute special vetting, contract requirements, and certifications for agents and consultants, especially those that are used in high risk countries and territories. In addition, the Board of Directors Audit Committee should specifically review money laundering issues with the Compliance Officer, especially looking at foreign agent contracts and foreign sales figures to look for anomalies.

3. Companies should require your foreign trade partners, as a condition of doing business, to institute anti-money laundering programs and provide "certifications" for example, of "end user". For example, General Electric's Money Laundering: Detection & Prevention pamphlet states that, "GE Appliances expects its business partners to comply with the anti-money laundering laws of the U.S. and encourages them to adopt appropriate money laundering prevention measures."

4. Make sure that you have mechanisms for the receipt and handling of FinCEN Financial Advisories or other government advisories

As I stated at the beginning, there are three fundamental truths at work in this area: corporations commit crimes, crimes should be punished, and it is better to prevent a crime than to punish one. In my mind, the last point is the most important. Corporate compliance officers play an absolutely essential role in ensuring that their corporations make the utmost efforts to comply with the law. In so doing, they protect both their corporations and the public interest of the United States, and I close as I began: I admire you for your efforts and thank you for them.

Thank you.